UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant, v. Sophie Valdez, d.b.a. La Parrilla Restaurant, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 89100014.

TABLE OF CONTENTS

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DECISION AND ORDER

E. MILTON FROSBURG, Administrative Law Judge

Appearances: GREGORY E. FEHLINGS and JOHN PAULSON, Attorneys for Immigration and Naturalization Service
CHARLES H. BARR, Attorney for Respondent

I. INTRODUCTION

The Immigration Reform and Control Act of 1986 (IRCA) established several major changes in national policy regarding illegal immigrants. Section 101 of IRCA amended the Immigration and Nationality Act of 1952 (the Act) by adding a new Section 274A, set out at Title 8 United States Code Sections 1324a, et seq., which seeks to control illegal immigration into the United States by the imposition of civil liabilities, commonly referred to as employer sanctions, upon employers who knowingly hire, recruit, refer for a fee, or continue to employ unauthorized aliens in the United States. Essential to the enforcement of this provision of the law is the requirement that employers comply with certain verification procedures as to the eligibility of new hires for employment in the United States.

Employer sanctions are imposed for ``knowing hiring'' violations and/or for ``paperwork'' violations. Section 274A(a)(1)(A) of the Act, the ``knowing hiring'' violation, prohibits the employment of an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment. Section 274A(h)(3) reads, in pertinent part:

> ``. . . the term `unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.''

Section 274A(a)(2) of the Act renders it unlawful for a person or other entity, who has hired an alien for employment in the United States after November 6, 1986, to ``continue to employ'' that alien knowing the alien is, or has become, an unauthorized alien with respect to such employment.

Sections 274A(a)(1)(B) and 274A(b) (1) and (2) of the Act, the ``paperwork'' violations, provide that an employer must attest on a designated form (the I-9 Form), it has verified an individual is not an unauthorized alien by examining certain specified documents to establish the identity of the individual and to evidence employment authorization. Further, at Section 274A(b)(3), the employer is required to retain, and make available for inspection, those forms for a specified period of time.

Section 274A(e)(4) of the Act authorizes the imposition of orders to cease and desist, along with civil money penalties for violation of the proscription against hiring or continuing to employ unauthorized aliens, and Section 274A(e)(5) authorizes civil money penalties for paperwork violations.

II. STATEMENT OF FACTS

The instant case involves one allegation of ``knowing hiring'' or ``continuing to employ'', and seven ``paperwork'' violations. This case began on October 12, 1988, when the United States of America, Immigration and Naturalization Service, served a Notice of Intent to Fine (NIF) on Sophie Valdez, d.b.a. La Parrilla Restaurant. The original Notice of Intent to Fine alleged, in Count I, one violation of Section 274A(a)(1)(A) of the Act for the knowing hiring of Pedro Escobedo-Guzman. Counts II through VI of the NIF alleged eleven violations of Section 274A(a)(1)(B).

On November 1, 1988, Respondent Sophie Valdez, through her Attorney, Charles H. Barr, filed a timely Answer to the NIF and exercised her statutory right to request before an Administrative Law Judge.

On January 9, 1989, the United States of America, through its Attorney, Gregory E. Fehlings, filed a Complaint with the Office of Chief Administrative Hearing Officer (OCAHO), thus initiating this administrative hearing proceeding. The Complaint incorporated the allegations contained in the Notice of Intent to Fine and requested relief in the amount of fifteen thousand two hundred fifty dollars ($15,250.).

The Office of Chief Administrative Hearing Officer sent a Notice of Hearing on Complaint Regarding Unlawful Employment to Respondent on January 18, 1989, transmitting a copy of the Complaint and, inter alia, setting the hearing date and place for May 9,

1989, at Richland, Washington, and assigning me as the Administrative Law Judge in the case.

Respondent, through her attorney of record, Answered the Complaint on January 25, 1989, denying the allegations of the Complaint and setting forth, the following affirmative defenses: (1) that she acted at all material times in good faith; (2) that Complainant violated the principle that more than one violation in the course of a single proceeding shall be counted as a single violation; and (3) that the investigation and processing of this matter and the issuance of the NIF deprived Respondent of her constitutional and statutory rights to due process and equal protection.

Complainant submitted an Amended Complaint on March 15, 1989, adding an alternative allegation of ``continuing to employ'' Pedro Escobedo-Guzman, in violation of 274A(a)(2). The Amended Complaint also changed the names and fines in Counts II-IV, and amended Count II to include violations occurring on a second date, October 7, 1988, in addition to the original date of August 10, 1988. The amount of the penalty proposed was reduced to nine thousand two hundred dollars ($9,200.), however, the amendment did not contain a prayer for relief. I accepted the Amended Complaint pursuant to 28 C.F.R. Section 68.6(e).

On May 1, 1989, Respondent submitted her Answer to Amended Complaint.

The evidentiary hearing in this matter was held on May 17 and 18, 1989, in Richland, Washington. Attorneys Gregory E. Fehlings and John Paulson represented the Complainant, and Charles H. Barr, having previously entered a notice of withdrawal, re-entered as counsel for the Respondent.

Ten witnesses were called in all, seven by Complainant and three by Respondent. Exhibits totaled seventy-nine; seventy-seven introduced by Complainant and two by Respondent. At the close of the hearing, parties were ordered to submit post-hearing briefs within twenty (20) days of their receipt of transcripts.

Complainant's Post-hearing Brief was submitted by Attorneys Fehlings and Paulson on July 17, 1989. On July 25, 1989, I issued an Order to Show Cause Why Respondent's Post-hearing Brief Had Not Been Filed. On August 9, 1989, Attorney Barr submitted Respondent's Response in which he explained that Respondent could not afford to purchase a copy of the transcript and was unable to procure additional legal services in the form of a Post-hearing Brief. Additionally, Respondent asked the court to bear in mind La Parrilla Restaurant's heavy debts, unpaid taxes, lack of assets, and its ultimate failure, as well as Ms. Valdez' own financial straits, in mitigation of any penalty that might be assessed.

Pursuant to 28 C.F.R. Section 68.51(b), this decision and order is entered within sixty (60) days of receipt of the parties respective responses. I remain mindful of Respondent's inability to file a Post-hearing Brief.

Respondent's filing of her response to my Order to Show Cause completed the record in this case. The record is now closed. The following pleadings and memoranda, not previously mentioned, yet necessary to an understanding of this case, are included here.

On February 6, 1989, I issued an Order Directing Pre-hearing Procedures. On the same date I received Complainant's Motion for a More Definite Statement. On March 3, 1989, I issued an Order Denying the Motion for a More Definite Statement and Ordering Respondent to Amend her Answer.

On April 4, 1989, Complainant made a Motion to Strike Respondent's Affirmative Defenses and on April 10, 1989, I Ordered Respondent To File an Answer to the Amended Complaint.

The first and second pre-hearing telephonic conferences in this case were conducted on April 10, and April 24, 1989. On April 21, 1989, for good cause shown, I ordered a continuance of the case until May 17, 1989.

Also on April 21, 1989, Complainant entered a Motion for Summary Decision with supporting documents and a Motion to Compel Response to Discovery. On April 27, 1989, Respondent's Attorney submitted a Notice of Withdrawal, to become effective when the scheduled telephonic conferences were completed, and requested a second continuance.

The third telephonic conference was held on April 28, 1989, during which I made oral rulings denying the motions then before me. A fourth call was made on May 2, 1989, at which time Alejandro DeLeon participated in the conference as the agent of Sophie Valdez.

On May 1, 1989, Respondent submitted her Answers to Complainants Request for Admissions. On May 3, 1989, I received Complaint's Motion To Reconsider, requesting me to reconsider my oral rulings rendered during the pre-hearing telephonic conference of April 28, 1989. On May 4, 1989, having determined on the pleadings that genuine issues of material fact existed, I issued a Written Order Denying Complainant's Motion for Summary Decision, Accepting Respondent Attorney's Notice of Withdrawal, and Compelling Respondent to Answer Complainant's Interrogatories. At the same time, I Denied Respondent's Request for Continuance.

On May 5, 1989, Complainant submitted a Motion to Compel Respondent's Response to Complainant's Second Request for Admissions. Having received the Motion on May 8, 1989, the Motion was

not granted due to its proximity to the hearing date. I did, however, issue Subpoenas Duces Tecum for Sophie Valdez and Eloy Merino-Tapia on that date.

Complainant submitted its pre-hearing statement on May 5, 1989; Respondent submitted its statement on May 8, 1989.

On May 10, 1989, I received a document entitled Corrections to Amended Complaint from Complainant which corrected the spelling of the name of an individual named in the Complaint, Renee Cryblskey, and included a prayer for relief which had been inadvertently left out of the Amended Complaint. I received Additional Corrections to Amended Complaint from Complainant on May 15, 1989. The May 15 corrections, captioned as typographical errors by Complainant, changed the Amended Complaint at Counts II and III to reflect violations of Section 274A(b) of the Act, rather than the more specific Section 274A(b)(1) previously alleged. I accepted the corrections pursuant to 28 C.F.R. Section 68.6(e).

The hearing ended on May 18, 1989. On June 23, 1989, Complainant requested an extension of time to file its post-hearing brief due to Attorney Fehling's duty to serve two weeks in the Army Reserve. On June 30, 1989, Respondent filed its objection to the motion on the grounds that Complainant was actively represented throughout the hearing by two attorneys. On July 6, 1989, seeing no prejudice to Respondent who had not yet purchased a transcript, I issued an order Granting Complainant's Request for Extension of Time to File Post-hearing Brief.

III. DISCUSSION

Notwithstanding the timely implementation of discovery procedures, the majority of the material facts in the instant action remained in dispute at the start of the hearing.

At the opening of the hearing, Attorney Barr re-entered the case as Counsel for Respondent. Respondent then offered to stipulate to liability for Count III of the Amended Complaint, in which the Government alleged the failure by the Respondent to prepare an I-9 Form within three (3) business days for Eloy Merino-Tapia, as required by the regulations at 8 C.F.R. Section 274a.2(b).

That stipulation having been made, liability for Count III was found against the Respondent. Counts I, II, and IV, of the Amended Complaint remained to be proven by the United States. The standard of proof in an OCAHO hearing is, pursuant to 28 C.F.R. Section 68.51(b), a preponderance of the evidence.[1]

[1] "Ins must show, of course, by a prepondrance of the evidence that the employer knowingly employed an unauthorized alien." Mester Manufactuing Co. V. INS,

1. Count I: Knowingly Hiring an Alien Unauthorized for Employment

a. The Charge

The elements of the offense of knowingly hiring an unauthorized alien are that a person or entity, after November 6, 1986, hires, for employment in the United States, an unauthorized alien; knowing the alien is an unauthorized alien with respect to such employment. For the proof of Count I, the elements are set out as follows:

Person or entity: In the Notice of Intent to Fine served by the Government, and in the subsequent pleadings, the Respondent was at all times identified as Sophie Valdez, d.b.a. La Parrilla Restaurant. The issue of whether DeLeon also had a partial ownership in the restaurant, was, however, presented in this case, and appeared in Complainant's Post-hearing Brief.

It is undisputed that DeLeon was the manager of the restaurant, having express and apparent authority to act as the agent of Valdez. It is also agreed that DeLeon and Valdez have lived at the same address for the past seven years. DeLeon testified at the hearing that, on the basis of those facts, he considered himself in his own mind, and within his culture, to be a partial owner of the restaurant. DeLeon, however, denied ownership of the restaurant (Tr. 480-481).

The issue of DeLeon's ownership or partial ownership of La Parrilla Restaurant appears to have been made for three reasons. First, for its obvious purpose, to show ownership of the restaurant, the person of ``entity'' doing the hiring. Second, for its opportunity to present the cultural perspectives of DeLeon and the Respondent. And third, to place into question the credibility of DeLeon as a Witness. Each of these purposes is appropriate.

Upon cross examination, the Government presented evidence that, in March of 1988, when DeLeon had been stopped for a traffic offense by a Washington State Patrol Officer, he identified himself as the owner of the M Body Shop and La Parrilla Restaurant. In response, DeLeon explained his prior inconsistent statement as having a cultural basis: ``In our culture what's her's is mine and what's mine that's her's. And paper that's different.'' (Tr. 516).

Testimony and pleadings did not prove by recognized legal standards that DeLeon could be considered an owner or partial owner of the restaurant. Therefore, I find, for purposes of the instant action, that DeLeon's role is that of an agent for Valdez and the manager of La Parrilla. Accordingly, Sophie Valdez, d/b/a La Parrilla Res-

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Case No. 88-7296, slip op. at 8908 (9th Cir., filed June 23, 1989, amended August 4, 1989) (Beezer, J.).

taurant, remains the sole Respondent, that is, the entity or person charged in the Complaint with the hiring of Pedro Escobedo-Guzman. (Escobedo).

After November 6, 1986: The second element was established by Complainant's proof that the restaurant opened for business on May 6, 1987, a date occurring after November 6, 1986.

Hires: The fact that Respondent hired Escobedo was convincingly established by the Government on a theory of implied agency through the actions of the head waitress, Maria Cruz. Respondent's denial of Cruz' authority was not persuasive.

The involvement of a third party, Rigoberto Rivas, did not meet the burden of proof. The evidence showed a connection between Rivas and DeLeon at the M Body Shop, and between Rivas and Cruz in their personal relationship, but no connection was established between Rivas and the restaurant or Rivas and Valdez. (Tr. 478)

The employment of Escobedo was discovered on June 23, 1988, when U.S. Border Patrol Agents Bryan and Putnam went to the restaurant to see DeLeon on a matter concerning the M Body Shop (Tr. 211). The only three people present in the restaurant, in addition to the officers, were Cruz, Escobedo, and Eloy Merino-Tapia (Merino). Respondent admitted that Cruz and Merino were employees.

According to Agent Putnam's testimony, he saw the two men run into the kitchen. When he called to them in English, they did not respond. But when he spoke in Spanish, the men came out (Tr. 217). The Agents questioned the men and learned they were employees of the restaurant. Escobedo said that he was illegal and was taken into custody. It was while he was in custody of the INS, that Escobedo stated he was hired to work at the restaurant by a man named Rigo.

Escobedo explained he had a cousin who worked at a body shop and was acquainted with Rigo Rivas. It was supposedly Rivas who told Escobedo he could work at the restaurant and instructed Cruz to put Escobedo to work there. (Tr. 307). According to Escobedo, Cruz told him it was okay for him to work (Tr. 308), and Cruz was the person who paid him for his work. (Tr. 309).

Merino, the other male employee of the restaurant present on that day, was also taken into custody for a records check and released after giving the Agents a statement. Merino had a temporary resident alien card (I-688A) and was legally authorized to work. In his statement, he told the Agents that Cruz was the person who had hired him.

DeLeon was out of the country at that time, having been confined to a Mexican jail from mid-May to early August, 1988. Nonetheless, DeLeon claimed at the hearing that he retained managerial control over the restaurant through bi-weekly telephone calls made from the jail (Tr. pp 491, 497-499) and that he did not give anyone authority to hire Escobedo.

Sophie Valdez also denies giving Cruz authority to hire anyone. Nonetheless, the regulations state that an employer is a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. 8 C.F.R. Section 274a.1(g).

It is evident that Cruz acted directly or indirectly in the interest of the Respondent when she hired Escobedo. Cruz was not acting so as to benefit herself personally nor to benefit anyone other than the restaurant. She put Escobedo to work for the benefit of the restaurant.

Although DeLeon may have believed he maintained sole supervisory authority over the restaurant, credible testimony shows that the head waitress, Cruz, was the person physically present at the restaurant while DeLeon was away. Valdez admitted at the hearing that some person had to control and direct the day-to-day operations of the restaurant. Therefore, I find that Cruz had apparent or implied authority, if not express authority, to hire Escobedo and that her actions are attributable to the Respondent.[2]

An Unauthorized Alien: The fourth element, the fact that Escobedo was an unauthorized alien at the time of his apprehension was convincingly established by his admission to the Border Patrol Agents, his ``voluntary departure'' by air to Mexico in July of 1988, and his admission under oath at the hearing.

Testimony also showed that Escobedo returned almost immediately to the United States and is presently authorized to work, having an I-688A card. Interestingly, Escobedo admitted that he committed fraud in his subsequent legalization application. While such a statement might detract from his credibility as a witness, I

[2]At common law, ``An employer may be held responsible for anyone acting as its agent if employees could reasonably believe that the agent was speaking for the employer.'' Idaho Falls Consolidated Hospitals, Inc. v. NLRB, 731 F.2d 1384 (9th Cir. 1984). The courts have held an employer responsible for employees acting on behalf of the employer even when the employer denies that her employee had authority to so act. E.g., NLRB v. Triumph Curing Center, 571 F.2d 462, 471 (9th Cir. 1978). [Although respondents contend that [an employee] acted on her own, an employer may still be liable in situations like this if other employees would have just cause to believe she was acting for and on behalf of the company.'']

do not find that he was lying when he said he was illegal in the first place. The processing of mala fide applicants for legalization is a separate concern for the INS and not covered by 274A of IRCA. It will not be addressed here.

This ``temporal'' quality to Escobedo having been an illegal alien for purposes of this action was anticipated by IRCA legislation. As noted previously, unauthorized alien is defined as meaning that the alien ``is not at that time either (A) an alien lawfully admitted for permanent residence, or (``B) authorized to be so employed by this Act or by the Attorney General--(emphasis added).'' I find that Escobedo was not, in June of 1988, authorized for work in the United States.

Knowing the Alien is Unauthorized: Having satisfied the first four elements of the charge with an abundance of testimony and physical evidence, proof of the fifth element, ``knowing the alien was not authorized for employment in the United States,'' is less easily arrived at. It is clear from the pleadings and the testimony that Valdez failed to grasp her responsibilities as an employer under IRCA. Valdez' description of her role in the operation of the restaurant, particularly during the time when the acknowledged manager of the restaurant was in jail outside of the United States, leaves the court unsatisfied.

Valdez testified that she was deliberately not involved with the day-to-day affairs of the restaurant. (Tr. pp. 108-109, 429, 431). She testified that she was particularly uninvolved with the affairs of the restaurant during the summer of 1988, while DeLeon was in jail in Mexico. (Tr. pp. 455-456) The question becomes, then, what standard of ``knowledge'', in a charge of ``knowing hiring'' will be applied to an employer who deliberately ignores the day-to-day operations of her business?

In a prior IRCA case concerning a similarly inattentive employer, United States of America v. Mester Manufacturing Co., IRCA Case No. 87100001, June 17, 1988, (Morse, J.), aff'd OCAHO (July 12, 1988), the ALJ stated:

> ``Rarely in my experience has an employer demonstrated as did [the employer] on the stand such a manifest lack of interest in the personnel practices of his own domain. . . . However, his lack of involvement in the day-to-day management of the personnel resource in general and in an employer's duties under IRCA, in particular, is most clear; he never gave any directions or suggestions concerning the I-9's.''

The Mester case involved an employer who had received some form of notice from the INS that certain of his employees might not have been authorized to work in the United States. The Mester Respondent asserted that it could not be held to ``knowledge not

imparted in conformity with established modes by which INS, in compliance with its own regulation, provides `the authorized means of service by the Service . . . of notices, decisions and other papers . . . in administrative proceedings before Service officers. . . .''

The ALJ concluded that ``it is irrelevant by what means respondent obtained notice sufficient to form the scienter by which it is concluded respondent knew, or should have known, that the status of the employees was that [of] unauthorized aliens.'' It was, then, the ALJ's position that ``knowing'', in a charge of ``knowingly continuing to employ'' under IRCA, included ``should have known.''[3]

The conclusion, that ``knowing'' includes ``should have known'' on a charge of ``knowingly continuing to employ'', was also reached by another Administrative Law Judge in United States v. New El Rey Sausage Company, Inc., IRCA Case No. 88100080, July 7, 1989, modified in part, not affecting this decision by OCAHO August 4, 1989. Like Mester, New El Rey Sausage involved an allegation of ``knowingly continue to employ'' after the INS had supplied the employer with information which placed upon the employer a duty to inquire further into the employment authorization of the employees.

In New El Rey Sausage, supra, the ALJ put forth his thoroughly researched and well presented views on the meaning of ``knowing'' in connection with IRCA civil proceedings. In adopting the constructive knowledge standard, the ALJ stated that:

> ``Most importantly, such an approach is consistent with that already worked through by Judge Morse, adopted by OCAHO, and affirmed by the Ninth Circuit and I view such consistency as providing a helpful congealing of the emerging meaning of ``knowing'' as used in cases alleging violations of section 1324a(A)(2) [knowingly continuing to employ].''

To the extent that the allegation in the instant case involves a ``knowing hiring'', this may be viewed as a case of first impression. There is an alternative allegation of ``knowingly continued to employ'' in this count, to which the persuasive prior OCAHO decisions could well be applied. The question presented is whether or not the same constructive knowledge standard by which it has been concluded an IRCA Respondent had knowledge on a charge of

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[3] In affirming the decision, the Ninth Circuit concluded that the ``knowledge element was satisfied: Mester had constructive knowledge, even if no Mester employee had actual specific knowledge of the employee's unauthorized status.'' Supra, at 8909. The Court cited United States v. Jewell, 532 F.22d 697, 702 (9th Cir.) (en banc) (in criminal law, deliberate failure to investigate suspicious circumstances imputes knowledge), cert. denied, 426 U.S. 951 (1976). Id.

``knowingly continuing to employ'', is to be applied in the case of a ``knowing hiring.'' I find that it is.

As Complainant's Post-hearing Brief states: ``The term `knowingly', even when used in criminal statutes, `is not limited to positive knowledge, but includes the state of mind of one who acts with an awareness of the high probability of the fact in question, such as one who does not possess positive knowledge only because he consciously avoids it.' United States v. Jewell, supra at 702.

It appears from the evidence that Valdez was acting with ``high probability'' of the fact that Escobedo was unauthorized. Although Valdez denies ever having seen him, Escobedo testified that he was working in the restaurant on more than one occasion when Valdez was present. It was allegedly due to these encounters that he was able to identify Valdez in the hearing room. (Tr. 321). As the Jewell Court stated, where a defendant is aware of facts indicating a high probability of illegality, but purposely fails to investigate on account of his desire to stay ignorant, he has knowledge of illegality. Id. at 700-701. Deliberate ignorance cannot reasonably be a defense.

It is unavailing for Valdez to assert that she did not recognize Escobedo. She believably explained the presence of non-employees in the kitchen area of the restaurant as an aspect of her culture. However, she did not explain her failure to differentiate between employees and nonemployees for her own purposes. Illegal aliens had previously been discovered working at La Parrilla Restaurant, for which Valdez had been cited and fined by the INS (see the facts infra). Therefore, when she saw Escobedo in the kitchen of the restaurant, it would have been reasonable for her, as the owner, to inquire whether he was an employee or a guest. This was particularly true at a time when the restaurant manager was out of town.

Additionally, as Complainant sets out in its Post-hearing Brief, every employer has the affirmative duty, by law, to inquire into each employee's employment eligibility and to complete a Form I-9 to reflect the results of that inquiry. Indeed, the legislation provides an affirmative defense to the charge of ``knowing hiring'' for employers who comply with the eligibility requirements. The legislation provides that if the employer performs the employee verification activities by completing an I-9 form, a rebuttable presumption is established that she has acted in good faith and the burden is shifted to the government to prove otherwise. Respondent admits that she did not prepare an I-9 Form for Escobedo.

Of course, even if the employer does not seek to establish an affirmative defense, the burden of proving a violation of the hiring prohibition always remains on the government--by a preponder-

ance of the evidence in the case of civil penalties and beyond a reasonable doubt in the case of criminal penalties. The mere failure to prepare an I-9 Form is not proof of knowledge.

The legislative history of IRCA establishes that the failure to complete an I-9 Form, in and of itself, was not intended to constitute a violation of Section 274A(a)(1)(A) of the Act. An early Senate version of the legislation containing such a presumption for failure to complete the forms was rejected in the later House version. See, Legislative History, IRCA, S. Rep. No. 99-132, 99th Cong., 1st Sess., at 32 (1985), and H. R. No. 99-682(I), 99th Cong., 2d Sess., at 57 (1986).

Respondent's failure to prepare an I-9 Form, when coupled with her conscious avoidance of acquiring knowledge as to the identification and status of her employees, provide believable circumstantial evidence of her knowledge of an employee's unauthorized status. For the reasons stated, I find that Valdez had constructive knowledge, if not actual knowledge, that Escobedo was not authorized for work in the United States.

All five elements of the charge having been proven by a preponderance of evidence, liability as to Count I is found against the Respondent.

b. Proposed Penalty

Complainant has requested a civil money penalty in the amount of four thousand dollars ($4,000.) for the alleged violation. The penalty for a first time violation of Section 274A(a)(1)(A) or (a)(2) is not less than two hundred fifty ($250.) and not more than two thousand ($2,000.). A penalty of four thousand dollars ($4,000.) is applicable only in cases in which the Respondent was previously subject to an Order under Section 274A(e)(4) of the Act. See, Section 274A(4)(A)(ii). Therefore, evidence of an earlier IRCA violation, occurring before the hiring of Escobedo, and resulting in an Order under Section 274A(e)(4) of the Act, was appropriately presented by the government.

The prior violation was not alleged in the Complaint, but was inferred by the size of the proposed fine, as noted above. The failure to plead a prior violation does not appear to be a structural deficiency in the pleadings, in that the Respondent was aware of her own earlier violation and, therefore, nor prejudiced by the lack of its inclusion in the Notice of Intent to Fine.

It was on November 4, 1987, that the INS first arrested two illegal aliens working at the La Parrilla Restaurant. U.S. Border Patrol Agent Edward L. Nelson recounted the events of that day at the hearing. As in the instant case he had gone into the restaurant

to serve a Notice of Inspection on DeLeon. After the Agent arrested the illegal aliens, he presented the Notice of Inspection on DeLeon. At the time, DeLeon waived the three (3) day waiting period and Agent Nelson conducted the inspection. No I-9 Forms were presented to the Agent by DeLeon.

This offense occurred during what was known as the ``Citation Period'' of the new law. As described in United States of America v. Big Bear Market, OCAHO Case No. 88100038, March 30, 1989, (Morse, J.):

> ``In recognition of the significant impact IRCA might be expected to have upon the national work place, and the need for public education concerning its provisions, during the first full six (6) months following enactment no enforcement action was permitted to take place, 8 U.S.C. Section 1324a(i)(1). During the subsequent twelve (12) months, June 1, 1987 through May 31, 1988, no enforcement action was permitted to occur for a first violation. Instead, as to any particular employer, it was required during the year ending May 31, 1988, that there first be a `citation' to the effect that the Attorney General (or his delegate) `has reason to believe that the person or entity may have violated . . .' the employer sanctions provisions. 8 U.S.C. Section 1324a(i)(2).''

Consequent with statute, Agent Nelson returned to the restaurant on November 5, 1987, and served DeLeon with a Citation for the restaurant.

On January 7, 1988, U.S. Border Patrol Agents again visited the Restaurant and arrested one of the unauthorized aliens for whom the earlier Citation had been served. During the visit, Agent Randall Hammer served DeLeon with a Notice of Inspection. DeLeon again waived the three day notice period and this time presented eight (8) I-9 Forms to the Agent. As a result of violations discovered during the January 7, 1988, inspection, a Notice of Intent to Fine was served on DeLeon, as agent for Respondent, on February 20, 1988.

The Notice charged Respondent with one count of knowingly hiring an illegal alien and seven counts of record keeping violations and assessed a penalty in the amount of nine hundred fifty dollars ($950.). Respondent did not request a hearing. Thereafter, on April 5, 1988, the INS served a Final Order upon DeLeon for the violations charged. It appears, although it is not set out precisely, that the April 5, 1988 Order is the prior order under Section 274A(a)(4) inferred by the penalty four thousand dollars ($4,000.) assessed in the instant action.

Subsequent testimony regarding Respondent's failure to pay the penalty ordered by INS is more appropriately considered as one of the factors which are to be given due consideration by the Administrative Law Judge pursuant to Section 274A(e)(5) of the Act. It is noted that the U.S. District Court of the Eastern District of Wash-

ington entered a Judgment by Default against Respondent on May 17, 1989, the first day of the Administrative Hearing.

c. Defenses

Respondent focused her defense to Count I in her Amended Answer on the lack of authority of Rigoberto Rivas to hire anyone on behalf of the restaurant. At the hearing, Respondent also denied Cruz' authority to act.

As stated previously, the acts of the waitress, Maria Cruz, but not the acts of Rigoberto Rivas, in putting Escobedo to work at the restaurant, are imputed to the employer.

2. Count II: Failure to Prepart I-9 Forms

Respondent was charged with failure to prepare Employment Verification forms on four named individuals: Cruz, Cryblskey, Escobedo, and Salas-Rocio (Salas). She was alternatively charged with failure to retain and/or make the forms available for inspection on two dates, August 10, 1988, and October 7, 1988. Respondent has persuasively defended the August 10, 1988, allegations on a theory of lack of proper notice (see facts infra at Count IV). The facts of the October 7, 1988, inspection and the proof of the allegations are set out below:

On September 27, 1988, a U.S. Border Patrol Agent encountered DeLeon in the Franklin County Jail. The Agent explained that although the attempted August inspection had failed, the INS still wanted to do an inspection of the pertinent records of the restaurant. DeLeon referred the Agent to Valdez. Valdez identified Renee Cryblskey as the bookkeeper for the restaurant and provided the Agent with a telephone number.

An inspection was scheduled by the INS with Cryblskey for October 7, 1988, 15 2:00 p.m. Agent Nelson's testimony shows there was effort by the INS to make this inspection a ``dual'' inspection for both the La Parrilla Restaurant and the M Body Shop, having case numbers for both businesses on the Notice of Inspection (TR. 139). I note for the record that we are concerned here only with the charges against the restaurant.

A confirmation letter on the inspection was also mailed to Valdez at her home by Agent Nelson, and Valdez does not deny having received notice of the inspection. On October 7, 1988, the U.S. Border Patrol Agents were met at the restaurant by Cryblskey. Respondent was charged with failure to present an I-9 Form for four named individuals as a result of that inspection.

The elements of a paperwork violations are that a person or other entity, after November 6, 1986, hires for employment in the United States, an individual, without complying with the Employ-

ment Verification Requirements of Section 274A(b) of the Immigration and Nationality Act. The first and second elements of the charge were sufficiently proven on facts previously recited. Elements three and four are discussed in relation to each of the employees names in Count II.

(1) Marie Cruz

At the hearing, Complainant moved to dismiss the allegations against Respondent for failing to prepare a Form I-9 with respect to Cruz (TR. 38). It was discovered by Complainant that Cruz used the name of Maria Galez De Rosas and that, as such, she was already the subject of a prior Notice of Intent to Fine. See, Complainant's Post-Hearing Brief. P. 47. The charge is accordingly dismissed.

(2) Renee Cryblskey

Respondent's liability concerning Cryblskey depended upon whether Cryblskey was, in fact, an employee of La Parrilla Restaurant at the time of the October 7, 1988 inspection. At the hearing Cryblskey claimed to have been an independent contractor on October 7, 1988, and to have become an employee of La Parrilla Restaurant in mid-October. She explained that she appeared on the fourth quarterly federal tax reports for La Parrilla as an employee as the result of her mid-October hiring by DeLeon, and as evidenced by a change from doing her bookkeeping work at home to doing her work at the restaurant.

Nonetheless, it is not clear to me that Cryblskey has actually been an employee of the restaurant at any time. The statutory language alone goes a long way to resolve the issue. At 8 C.F.R. 274a.1(f), the term employee is defined as ``an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section. . . .''

Paragraph (j) states that ``the term independent contractor includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results.

Significantly, 8 C.F.R. 274a.1(j) continues, ``Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual entity: Supplies the tools or materials; makes services available to the general public, works for a number of clients at the same time; directs the order or se-

quence in which the work is to be done and determines the hours during which the work is to be done. . . .''

Applying the statutory test, testimony shows Cryblskey was given records which made no ``sense whatsoever'' and was told to reconstruct the records (Tr. 472). The means and methods she applied had to be her own because none were in existence at the time. It was her job was to create the bookkeeping system. The result was to be a set of books which would provide the necessary records for payroll, monthly receipts, taxes and other purposes. Cryblskey, then, was subject to control only as to results.

Cryblskey supplies her own adding machine and buys her own pencils and paper (Tr. 474), applies her own methods of bookkeeping, and she can sell her bookkeeping services to other employers. This is evidenced by her simultaneous ``employment'' at La Parrilla Restaurant and the M Body Shop, as well as the mention of her work for Doug's Towing and other businesses.

In addition to the statutory definitions, the traditional common-law test for distinguishing between employees and independent contractors is the ``right to control'' reserved by the person for whom the work is to be done, ``not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished.'' N.L.R.B. v. Phoenix Life Insurance Co., 167 F.2d 983,986 (7 Cir. 1948), cert. denied, 335 U.S. 845 (1948), as quoted in Smith v. Dutra Trucking Co., (DC CAL 1976), 13 Employment Practices Decisions (CCH), para. 11,460.

The Dutra case involved differentiating ``employee'' from ``independent contractor'' for purposes of Title VII. In Dutra an independent truck owner-operator contracting as a subhauler with a trucking company was found not to be an employee of the trucking company for purposes of Title VII coverage. The Court found that, Dutra exercised minimal control over the subhaulers with whom it contacted, ``The mere fact that plaintiff received an hourly rate, was directed to the jobsite, and was requested to arrive and depart at specified times did not transform her into an employee.'' Id at 6587.

Complainant points out that the absence of the need to control is not to be confused with the absence of the right to control.[4] It is difficult to conceive of either DeLeon or Valdez controlling Cryblskey's work. Valdez has denied any active part in the control of the business at all. DeLeon admits that there was not record keeping

[4]The right to control as incident of employment requires only such supervision as the nature of the work requires. McGuire v. United States, 349 F.2d 644, 646 (9th Cir. 1965).

system until Cryblskey's work was contracted, and that he used her services at the M Body Shop as well, where the amount of paperwork was much less (Tr. 472-474).

Additionally, Respondent has cited financial problems with the Department of Labor and Industries, the Department of Revenue, and the Department of Employment Security (Tr. 436), all attributed to the lack of proper records and filings (Tr. 471), as a factor in her ability to pay penalties in the instant action. In view of these past bookkeeping problems, it appears most unlikely that Valdez or DeLeon could have directed Cryblskey in her work.

Having applied the facts to the statutory test and to the common-law standard, Cryblskey was an independent contractor with respect to Respondent and was not required to produce a Form I-9 for herself at the time of the October 7, 1988, inspection. The mere fact that she called herself an employee, or that she received an hourly rate for her work, or that she was directed to work at the restaurant, did not transform her into an employee. Although I need not go beyond that date, it is my opinion, based on competent evidence and testimony, that her status remained that of an independent contractor thereafter.

Accordingly, I find that the third element of the offense, the hiring of Cryblskey, was not proven, and, therefore, Respondent did not violate Section 274A(a)(1)(B) with regard to Renee Cryblskey.

(3) Pedro Escobedo-Guzman

The third and fourth elements, that Respondent did hire Escobedo and that Respondent did not prepare a I-9 Form for him are established by the liability found for the hiring of an unauthorized alien in Count I. Evidence shows that Respondent has never produced an I-9 Form for Escobedo. Also, Escobedo told Border Patrol Agents when he was arrested on June 23, 1988, that his employer had never prepared an I-9 Form for him and Respondent conceded that she had not prepared an I-9 Form on Escobedo in her answer to Complainant's Request for Admissions.

Accordingly, I find that Complainant has proven the elements of the charge in Count II for Escobedo and, therefore, Respondent did violate Section 274A(a)(1)(B) of the Act with regard to Pedro Escobedo-Guzman.

(4) Jesse Salas-Rocio

The third element in this charge is the hiring of Salas by Respondent. It appears that the reason Complainant alleged a failure to produce a Form I-9 in Count II for Salas was that Border Patrol Agents understood Cryblskey to have said that Salas was the assistant manager of the restaurant.

Cryblskey denied under oath at hearing that she said Salas was an employee (Tr. 542). She explained that she named him as someone to go to in DeLeon's absence (Tr. 542). DeLeon also described him as a friend to be called when he [DeLeon] could not be reached (Tr. 475-476). Respondent, too, denies that she ever had an assistant manager (Tr. 429) or that she ever paid Salas for any service or advice (Tr. 431).

There is no claim that anyone ever knew Salas to be working at, or on behalf of, the restaurant, nor has anyone identified any regular duties he would have had as the assistant manager. Moreover, there is no indication from the evidence that such a small a business as La Parrilla Restaurant would need to have an assistant manager.

Complainant's brief proposed that Respondent's failure to call Salas as a witness necessarily would lead to an adverse inference against Respondent.[5]

However, since Cryblskey was called to give testimony regarding her alleged statement to the Agent, and because she denied that she said Salas was an employee, I do not view the failure to call Salas as creating any adverse inference.

Accordingly, the contested statement by Cryblskey was the only evidence offered to show Salas as an employee and there was no other evidence offered in corroboration of the statement. Therefore, I find that the third element of the charge is not proven by a preponderance of the evidence, and that Respondent has not violated Section 274A(a)(l)(B) of the Act in respect to the fourth named individual in Count II of the Complaint, Jesse Salas-Rocio.

3. Count III: Untimely Preparation of I-9 Form

Liability as to Count III was admitted by Respondent at the beginning of the hearing. Merino's I-9 Form was dated October 4, 1988. The evidence showed that Merino was working at the restaurant on June 23, 1988, when the Border Patrol Agents arrested Escobedo. Respondent has stipulated, as described previously, that she failed to complete a Form I-9 for Merino within three (3) business days of hire.

Accordingly, I find that Respondent has violated Section 274A(a)(1)(B) of the Act in that she did hire Merino for Employment in the United States after November 6, 1986, and that she failed to timely verify his employment eligibility by completing an

[5] NLRB v. Cornell of California, Inc., 577 F.2d 513, 517 (9th Cir. 1978) [party's failure to call witness upon whom it relies leads to an adverse inference against the party.]

I-9 Form for him within three business days as required by Section 274A(b) of the Act, 8 U.S.C. 1324a(b) and 8 C.F.R. Section 274a.2(b).

4. Count IV: Failure to Make I-9 Forms Available for Inspection

Count IV Charges Respondent with failure to retain and/or make two I-9 Forms available for inspection on August 10, 1988. The individuals named in the Court are Ofelia Sara Alvarez (Alvarez) and Miguel Enrique Velasquez (Velasquez). Respondent's receipt of notice of the August 10, 1988, was at issue. The INS mailed a Notice of Inspection to La Parrilla Restaurant on August 2, 1988, indicating that the date and time of the inspection were to be August 10, 1988, at 10:00 a.m. The INS received a return receipt for the letter signed by Eloy Merino. Having received no word to the contrary from Respondent, the U.S. Border Patrol Agents attempted to carry out the inspection on August 10. When the Agents arrived at the restaurant, the restaurant was closed.

The regulations at 8 C.F.R. Section 274a.2(b)(2)(ii) state in pertinent part that:

> ``Any person or entity required to retain Forms I-9 in accordance with this section shall be provided with at least three days notice prior to an inspection of the Forms by an authorized Service office.''

Thus it is clear that IRCA regulations do require some sort of notice. Complainant argued that such notice may be accomplished by mail, and alleged that Respondent had notice of the inspection because of the return receipt for the Notice of Inspection signed by Merino (Tr. 123).

The appropriateness of notice by mail is not questioned here. Rather we are concerned with this particular instance of notice by mail in an IRCA action. In the instance case, the person who signed for the letter was a kitchen worker who was illerate in English. Additionally, Respondent has testified that the employees of the restaurant had been expressly instructed not to sign for registered mail, stating that only she and DeLeon had such authority.

Evidence shows that DeLeon was released from a jail in Mexico on August 5, 1988. Respondent flew to Mexico on August 4, 1988, to meet him upon his release. They drove back from Mexico together and did not return to the State of Washington until after August 10, 1988 (Tr. 427, 428). This time period coincides precisely with the service of the Notice of Inspection by mail and its receipt at the restaurant.

Valdez and DeLeon testified that they have lived together for the past seven years. We know that DeLeon was in jail in Mexico from mid-May, 1988 until August 5, 1988. It is not difficult to believe, therefore, that Valdez was out of town on August 10, 1988, for the

purpose of meeting DeLeon, and not to evade an inspection of I-9 Forms by the Government.

Respondent testified that she telephoned the restaurant the day before she left Washington and that no one mentioned a registered letter or Notice of Inspection to her (Tr. 429). She also testified that the restaurant was open when she left for Mexico, but that it was closed when she returned after August 10, 1988 (Tr. 428). She stated that the restaurant was not closed for any purpose of evasion of the inspection.

Therefore, I am not persuaded that Respondent should be liable for a failure to present I-9 Forms for inspection on August 10, 1988. It is uncertain whether she had notice of the inspection which she was entitled to by the regulations, and there is credible evidence that she and the restaurant manager were out of town for reasons unrelated to any letter from the government.

Additionally, the Government admits that in its inspection of I-9 Forms on October 7, 1988, the Respondent provided an I-9 Form for Alvarez, prepared on February 20, 1988, showing her to be authorized for employment by INS No. A90338878, and an I-9 Form for Velazquez dated April 11, 1988, by him and April 12, 1988, by the restaurant, showing he was authorized by INS for employment under No. A90642431.

Accordingly, the forth element of the charge in Count IV of the Amended Complaint, Respondent's failure to comply with the Employment Verification Requirements of Section 274A(b) of the Act, has not been proven by a preponderance of the evidence. I find that the inspection of I-9 Forms did not take place on August 10, 1988, because the Respondent did not have the three days notice as required by the regulations at 8 C.F.R. Section 274a.2(b)(2)(ii). Therefore, Respondent is not liable for failure to retain or make a Form I-9 available for inspection on Ofelia Sara Alvarez or Miguel Enrique Velazquez on August 10, 1988.

Neither am I persuaded that the Government acted in bad faith on this charge, as urged by Respondent in her Answer to Amended Complaint. The evidence does not show that the Government necessarily knew, or should have known, all of the facts surrounding the August inspection prior to the filing of its Amended Complaint on March 15, 1989.

IV. CIVIL MONEY PENALTIES

1. The Knowing Hiring Violation

As appears from the foregoing discussion, it is my judgment that Respondent has violated Section 274A(a)(1)(A) of the Act, in that she hired for employmentin the United States after November 6,

1986, an alien knowing the alien was unauthorized for employment in the United States, as alleged in Count I of the Complaint.

Having found the violation, I must assess a civil money penalty pursuant to Section 274A(e)(4)(A) of the Act, which requires the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of:

> ``(1) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,
>
> (ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this subparagraph, or. . . .''

The legislation goes on to permit penalties up to $10,000 for each alien in the case of a person previously subject to more than one Order. Respondent has previously been the subject of one such Order and Complainant seeks a penalty in the amount of four thousand dollars ($4,000.). Unlike the regulations regarding paperwork violations, the legislation does not require that the Administrative Law Judge give due consideration to employer-related factors such as size of the business, good faith of the employer, seriousness of the offense, or status of the alien, when assessing a penalty for a knowing hiring violation.

Nonetheless, the ALJ is not entirely without discretion. As the ALJ stated in United States v. Mester Manufacturing, supra, ``Generally, although not inevitably, the amount of the penalty asserted by INS in the NIF may be considered as a ceiling.'' I am in agreement with this premise. Complainant has supplied us with a complete and helpful record containing exhibits and testimony related to the previous Order which merit discussion before proceeding with the assessment.

From the record we know that Juan Jinez-Gonzales (Jinez), previously employed as a cook at the restaurant, was one of two unauthorized aliens named in the November 5, 1987 Citation issued to La Parrilla Restaurant by the INS, and Jinez was the only unauthorized alien named in the February 20, 1988 Notice of Intent to Fine.

The testimony of U.S. Border Patrol Agent Hammer shows that Jinez had been given a Form I-94 referral to a legalization office because he qualified for work authorization under the new law. DeLeon accompanied Jinez to the legalization office in an effort to get the papers in order, and experienced a problem caused by the legalization office's refusal to accept Jinez' paperwork in longhand. Therefore, the attempted legalization process was not completed before the Agents returned on January 7, 1988, and found Jinez

still working at La Parrilla. Apparently, Jinez was the restaurant's only cook.

There is no doubt DeLeon was told Jinez was not authorized to work until the paperwork was completed correctly. Respondent's continued employment of Jinez appropriately resulted in the allegations made against the restaurant in the February 1988 NIF and the Final Order in April 1988. The INS acknowledged the attempted cooperation of Respondent by assessing a minimum fine for offense.

This evidence convinces me that Respondent did not ignore the earlier Citation, and that she did try to do something, albeit inadequate, about the unauthorized status of one of her employees. Additionally, I am cognizant of Respondent's financial situation. The record shows that the restaurant is closed and that Respondent is currently cooperating with state and federal officials to pay past due taxes. It is clear that Respondent's ability to pay additional penalties is limited.

I am mindful of Respondent's financial situation. Because the penalty in the instant case is for a second offense, and the predicate first offense was not without mitigating circumstances, it is appropriate that I consider these facts in determining the amount of the penalty. Additionally, since the penalty amounts are incrementally increased by the statute for the second offense, any amount within the statutory limit necessarily takes into consideration the fact that it is a second offense.

In view of the statutory scheme, and recognizing I have facts before me which were unknown to the Government when the penalty was assessed, it is appropriate at this time that I remit the proposed penalty. Considering the amount requested by the INS to be a ceiling, I hereby reduce the proposed penalty on Count I from four thousand dollars ($4,000.) to three thousand dollars ($3,000.).

2. The Paperwork Violations

Having determined that Respondent violated Section 274A(a)(1)(B) of the Act in that she did hire for employment in the United States, after November 6, 1986, Pedro Escobedo and Eloy Merino, without complying with the requirements of Section 274A(b), I must assess a civil money penalty for those violations.

In contrast to the knowing hiring violation, the statute sets out the factors which the ALJ must consider in assessing the civil money penalty for paperwork violations. Section 274A(e)(5) reads:

> (5) Order for Civil Money Penalty for Paperwork Violations. With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation oc-

curred. In determining the amount of the penalty, due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations.

Prior to discussing the mitigating factors, it should be noted that these factors are considered here only as they apply to the instant Respondent and must be applied on a case by case basis due to the variety of employers subject to IRCA legislation.

The first factor to be considered here is the size of the business. In this instance of a sole proprietor restaurant, the plain meaning of the statutory language would lead me to consider the number of employees, the physical size of the business, and the past and present profitability of the business activity.

La Parrilla was a small business, often having only a waitress, a cook, and a dishwasher as its crew. The restaurant itself was small and, according to testimony, had a record of limited profitability in the summer months and possible financial loses over the winter. The restaurant is, as previously mentioned, now closed. Therefore, I find the factor of size weighs heavily in Respondent's favor.

The second factor is the good faith of the employer. While recent attempts of Respondent Valdez and manager DeLeon to organize the paperwork for the restaurant are commendable, the actions are, nonetheless, somewhat tardy. Respondent has experienced problems with several governmental agencies, in addition to the present problem with the INS, due to her past lack of control over the day to day operations of the business. It is difficult to attribute a strong showing of good faith to the past actions of the Respondent and/or her agents in regard to the completion of I-9 Forms for the restaurant.

Third, I must consider the seriousness of the violation. In Count II, Respondent was charged with the total failure to prepare an I-9 Form for Escobedo, and in Count III, the failure to prepare an I-9 Form for Merino in a timely manner. It is also appropriate here to consider the employees for whom I-9 Forms were completed correctly and the circumstances under which they were properly completed by Respondent. It appears from the record that Respondent was successful in preparing I-9 Forms for some of her employees.

Fourth, I must consider whether the individuals were unauthorized aliens, and fifth, Respondent's history of previous violations. The facts surrounding these last two factors, and my findings concerning them, were set out at length in the discussion of the charges. One of the two individuals was unauthorized. Respondent did have one previous violation during the citation period for which no penalty could issue, and a second violation during the ci-

tation period for which a penalty was assessed and reduced to a judgment by the U.S. District Court for the Eastern District of the State of Washington.

In consideration of the above factors, I find that Respondent is required to pay a civil money penalty in the amount of seven hundred dollars ($700.) for the charge in Count II for Escobedo, and the Respondent is required to pay a civil money penalty in the amount of six hundred dollars ($600.) for the charge in Count III for Merino.

V. ULTIMATE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I have considered the pleadings, memoranda, testimony, evidence, arguments and briefs submitted by the parties. Accordingly, and in addition to the findings and conclusions previously mentioned, I make the following findings of fact and conclusions of law:

1. As previously found and discussed, I determine, upon the preponderance of the evidence, that Respondent Sophie Valdez, d/b/a La Parrilla Restaurant, violated Section 274A(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. Section 1324a(a)(1)(A), by employing in June of 1988 (a date after November 6, 1986), Pedro Escobed-Guzman, an alien at that time unauthorized for work in the United States, knowing the alien was unauthorized for employment.

2. That the good faith affirmative defense is unavailing to a charge of violating Section 274A(a)(1)(A) where, as here, the Respondent has failed to establish compliance with the requirements of the Employment Eligibility Verification system established pursuant to Section 274A(a)(1)(B) and 274A(b) of the Act.

3. That, if Respondent should reopen La Parrilla Restaurant in the future, Respondent is Ordered, pursuant to Section 274A(e)(4)(A), to cease and desist from violations of Section 274A(a)(1)(B).

4. That, if the Respondent should reopen La Parrilla Restaurant in the future, Respondent is Ordered, pursuant to Section 274A(e)(4)(B), to comply with the requirements of Section 274A(b) with respect to individuals hired for a period of three years.

5. As previously found and discussed, I determine, upon a preponderance of the evidence, that respondent violated Section 274A(a)(1)(B) of the Act by employing Pedro Escobedo-Guzman, after November 6, 1986, without complying with the requirements of Section 274A(a)(1)(B) and 274A(b) of the Act.

6. That, liability for Count III having been admitted by the Respondent, Respondent has violated Section 274A(a)(1)(B) of the Act

by employing Eloy Merino, after November 6, 1986, without complying with the requirements of Section 274A(a)(1)(B) and 274A(b) of the Act.

7. That, as previously discussed, it is just and reasonable to require Respondent to pay a civil money penalty in the amount of three thousand dollars ($3,000.) for Count I, in the amount of seven hundred dollars ($700.) for Count II, and in the amount of six hundred dollars ($600.) for Count III, for a total civil money penalty of four thousand three hundred dollars ($4,300.)

8. That Count IV is dismissed on the merits for failure of proof.

9. That all motions not previously ruled upon are hereby denied.

10. That, pursuant to 28 C.F.R. 68.52, this decision and order shall become the final decision and order of the Attorney General unless within thirty (30) days from this date the Chief Administrative Hearing Officer shall have modified or vacated it.

IT IS SO ORDERED: This 27th day of September, 1989, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge
Executive Office for Immigration Review
Office of the Administrative Law Judge
950 Sixth Avenue, Suite 401
San Diego, California 92101